DOCUMENT RESUME

ED 451 734 HE 033 797

TITLE	Ownership of New Works at the University: Unbundling of Rights and the Pursuit of Higher Learning. Discussion Series.
INSTITUTION	California State Univ., Sacramento.; State Univ. of New York, Albany.; City Univ. of New York, NY.
PUB DATE	1997-00-00
NOTE	42p.
AVAILABLE FROM	For full text: http://www.cetus.org.
PUB TYPE	Reports - Descriptive (141)
EDRS PRICE	MF01/PC02 Plus Postage.
DESCRIPTORS	*College Faculty; Educational Policy; *Higher Education; *Intellectual Property; *Legal Responsibility; Models; *Policy Formation
IDENTIFIERS	Ownership Patterns

ABSTRACT

This booklet offers a framework for present and future discussions of issues surrounding the ownership of intellectual property, with a focus on issues of copyright. It addresses three concepts that are important for education and the creation and use of information. The first is that the initial ownership of newly created intellectual property in traditional university settings and the subsequent disposition of the associated property rights often has been unguided. The second concept is that the effectiveness of higher education requires a better understanding of how ownership rights associated with new intellectual property promote the mutual benefit of faculty, staff, students, and their learning communities. The third is that new models for the allocation of intellectual rights must be considered and designed to anticipate the influence of new technologies on teaching, learning, research, and creative activity in U.S. universities. Of particular interest will be issues associated with distance education and forms of educational technology. Central to the recommendations for the future is unbundling rights associated with new works to make them most appropriately available for teaching, learning, and research. Other recommendations call for standard policies and practices to remove confusion over the ownership and use of materials. (Contains 11 references.) (SLD)

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Discussion Series

Ownership of New Works at the University: *Unbundling of Rights and the Pursuit of Higher Learning*

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Ms. Bonnie Dunn
CSU Chancellor's Office
P.O. Box 3842
Seal Beach, CA 90740-7842
E-mail: bonnie@calstate.edu

The Intellectual Property Guidelines and Ownership Principles contained in this pamphlet have been received by:

- **California State University**
- **State University of New York**
- **City University of New York**
- **California Faculty Association** (NEA, AAUP, SEIU AFL/CIO)

The following publications are part of a series intended to stimulate thinking and discussion in the academic community and do not represent official policies of CSU, SUNY and CUNY:

- *The Academic Library in the Information Age: Changing Roles*
- *Fair Use of Copyrighted Works: A Crucial Element in Educating America*
- *Information Resources and Library Services for Distance Learners: A Framework for Quality*
- *Ownership of New Works at the University: Unbundling of Rights and the Pursuit of Higher Learning*

Introduction

The chief executives of the California State University (CSU), the State University of New York (SUNY), and the City University of New York (CUNY) have identified copyright and intellectual property as central issues that will increasingly affect the future of American higher education. They have agreed to work together on these important educational issues in an effort to advance higher education across the nation. This booklet summarizes the results of the deliberations of the CSU-SUNY-CUNY Work Group on Ownership, Legal Rights of Use, and Fair Use in the subject area of the ownership of new works in a university setting.

Purpose

This booklet offers a framework for present and future discussions of issues surrounding the ownership of intellectual property. It addresses three concepts which are important for education and for the creation and use of information. First, the initial ownership of newly created intellectual property in traditional university settings, and the subsequent disposition of the associated ownership rights, often has been unguided—sometimes to the detriment of teaching, learning, and research. Second, the effectiveness of higher education requires a better understanding of how ownership rights associated with new intellectual property promote the mutual benefit of faculty, staff, students and their learning communities. Third, new models for the allocation of intellectual rights must be considered and designed which anticipate the influence of new technologies on teaching, learning, research, and creative activity in American universities.

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Call to Action

The CSU-SUNY-CUNY systems of higher education seek to promote and enhance both the freedom of inquiry essential to scholarship and creativity and the freedom of access to ideas and information essential to teaching and learning. They seek to join with other colleges, universities, professional associations, government agencies, and private companies engaged in advancing the educational opportunity to further an understanding of intellectual property rights and the critical role the concept of ownership allocation can play in maintaining the creative vitality of American higher education.

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SECTION 1

The Need for New Attention to the Ownership of Intellectual Property in the University Setting

"The Congress shall have Power...To promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries..."

United States Constitution, Article I.

...the act of expressing an idea in a concrete or "fixed" fashion transforms thought into intellectual property.

Intellectual property is as old as the ability to take an abstract thought and fix it in a tangible medium. Whether chiseled on rock, printed on paper, or in transit on an electronic highway, the act of expressing an idea in a concrete or "fixed" fashion transforms thought into intellectual property. Intellectual property long has been created as a normal and primary consequence of fulfilling the mission of a college or university. Yet today's rapidly changing educational and technological environment brings new challenges to old practices. For example, the growing significance of legal protections for creative works, particularly in an era of exact duplications and rapid transmissions of works, necessitates greater awareness of copyright law and thoughtful managerial practices. While innovative technological capabilities are becoming commonplace, the consequences that follow from them are far from clear.

Traditionally, the university professor has been the sole author and copyright owner of most new works in higher education. Today, some university faculty members produce works that use an entire team of experts to bring a project to fruition. Team members contribute original expressions and elements to the final product, potentially entitling each person to some claim of legal rights. Examples of such collaborative and technologically advanced endeavors include digital conversions of images, sounds, and text; multimedia composite works; and some works used in distance learning. Likewise, university support of such collaborative efforts often has changed to include

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considerable investment in equipment and staff support. In this collaborative mode, simple individual ownership of all the rights associated with copyright may no longer best serve academic needs.

Rather than responding to this changing creative and economic environment with a sweeping and simplistic redesignation of copyright ownership, this booklet proposes an integrative, and perhaps more complex, reallocation or "unbundling" of the rights associated with copyright. A more creative conceptualization of copyright may help avoid the animosities and misunderstandings that often arise amidst discussions and debates over the ownership of intellectual property. Also, the concept of unbundling of rights—the creative sharing or licensing of specific rights—can help focus discussion on optimizing access to the intellectual content of new works and steer debates away from the economic issues of royalties and revenue sharing (whether such proceeds are large or small) that sometimes unduly monopolize intellectual property questions and distract attention from the widest pursuit of knowledge.

This booklet proposes... reallocation or "unbundling" of the rights associated with copyright.

Finally, through creative reallocations of rights, members of the university community can use copyright protection to better serve the wide range of dynamic interests associated with the growth and sharing of knowledge, which are the core of a university's mission—all in direct furtherance of the Constitution's provision that copyright should "promote the Progress of Science and the useful Arts."

Copyright: Only One Type of Intellectual Property

Intellectual property generally consists of four types—copyrights, patents, trademarks, and trade secrets—but this booklet deals primarily with rights that copyright owners may exercise and allocate. Copyright has been, and continues to be, fundamentally different from patents, both conceptually and economically. Many universities require assignment of all patent rights to the university, with the inventor perhaps retaining a share

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of any royalties. Copyright, on the other hand, protects the highly personal, literary, expository, and creative expressions which often grow from an instructor's overall program of teaching and research, and each work can become the foundation for a future agenda of scholarly inquiry.

Other Important Considerations

Copyright is complex. Much of the law is fluid and is shaped by assumptions that are crucial in the world of commerce but less important in the academy. Moreover, ethical concerns and other legal matters associated with the world of ideas or research afford some protection to the ideas which initiate the creative process or to the hard-won data which are the product of the research process. These topics and others, such as plagiarism, proper citation of works, and the protection of property—as property subject to theft, for example—are beyond the scope of this booklet.

Copyright... protects the highly personal, literary, expository, and creative expressions which often grow from an instructor's overall program of teaching and research...

SECTION 2

University Guidelines for Intellectual Property

The management and administration of matters related to university contracts, policies, and guidelines which bear on the creation, ownership, storage, and use of intellectual properties should:

- Foster the creation of the best possible quality new intellectual properties so as to further the academic mission of higher education.
- Foster the dissemination of new knowledge and the maintenance of high academic standards.
- Provide incentive for university faculty, staff, and students to fully participate in the use and creation of intellectual properties.
- Recognize that newly created intellectual properties in a university setting come in a wide variety of specific contexts. Nonetheless, strong mutual interests are shared among the university, the faculty, the staff, and the students in the appropriate allocation of the ownership rights associated with such intellectual properties.
- Support the concept that the ownership of intellectual property rights is not necessarily an "all-or-nothing" proposition. Rather, the set of rights that belongs to the owners of intellectual properties may be allocated so as to optimally support the mutual interests of the university, faculty, staff, and students.
- Foster within the university community the continued collective and individual ability to access, acquire, and store information and works, to help scholars and students in the proper use and citation of the

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works of others, and to maintain coordination and contact with the world of publishers and other information providers.

- Adapt university contracts, policies, and guidelines appropriately so as to address the challenges and opportunities presented as technologies and cultures continue to evolve and affect the practices of higher education.

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SECTION 3

Fundamentals of Copyright Ownership: Overview and Meaning for Higher Education

Why Examine the Ownership of Newly Created Works?

An examination of current practices with respect to the ownership and management of copyrighted works is timely and essential. Recent technological developments create new opportunities for creators and authors to produce and distribute new works and give new meaning to the terms "creator" and "publisher." The recent advent and rapid growth of the Internet and other electronic distribution mechanisms for information exchange are salient examples of why we should reexamine the current copyright environment. Thus, ownership questions worthy of discussion in the traditional context of print media have now become more critical given the impact of technology on the production and distribution of information in higher education and its scholarly and creative endeavors.

Recent technological developments... give new meaning to the terms "creator" and "publisher."

The copyright decisions of faculty members, in particular, too often ignore complex nuances associated with copyright. Promotion and tenure policies within universities often encourage faculty to emphasize the quest for publication without focusing directly on optimal access to new works for the advancement of learning. Too often copyright is assigned to publishers without the author's having reserved rights to future uses such as the incorporation of elements of a copyrighted work into his or her next work or the photocopying of the author's journal article even for his or her own teaching and research. Moreover, revenue from sales of many faculty works—notably research articles—often flows to third parties, much to the frustration of universities and funding agencies which underwrite most works produced at the university and which then find themselves in the position of having to

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buy the work back in the form of subscription fees, royalty payments, and other current and future costs. The economic equilibrium associated with traditional faculty scholarly publications has led some to conclude that both the traditional publishing industry itself and the ability of the university to acquire the materials which its mission requires are in jeopardy.

Discussions of ownership and creativity ...should provide... mutual reinforcement of shared interests and operate positively...

Discussions of ownership and creativity too often isolate parties at opposite ends of a linear continuum, manifesting a competitive relationship between the author and the university. Our position, however, takes a different perspective. We prefer to think of the relationship of the author and the university, centered on issues related to copyright, as circular rather than linear. This interdependent relationship provides ongoing mutual reinforcement of shared interests and operates positively as a dynamic system in which:

- the creative environment fosters work protected by copyright;
- the works are protected by copyright ownership;
- the benefits of authorship accrue to the creator/author;
- appropriate benefits of ownership also accrue to the institution;
- the institution fosters a creative/scholarly environment;
- and the creative cycle can begin again.

What Does Copyright Law Protect?

Copyright protection vests automatically upon creation of any protectable work.

Copyright law protects original works of authorship that are "fixed in any tangible medium of expression." Protectable works include books, articles, artwork, music, software, traditional or electronic correspondence, and materials placed or found on the Internet.

Copyright protection vests automatically upon creation of any protectable work. Placing a copyright notice on the work and registering it with the U.S. Copyright Office are no longer required. These steps, however, are still good practice and provide some legal benefits in the unlikely event of a lawsuit. You may also use the

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copyright notice as an opportunity to clarify how you prefer to share your work with others (see, for example, the notice at the beginning of this booklet).

For more information about registering your work, call the U.S. Copyright Office at (202) 707-9100 to request forms and instructions, or check its home page at: **http://lcweb.loc.gov/copyright/**.

The copyright owner holds the exclusive rights
• to reproduce
• to distribute
• to make derivative works
• to publicly perform
• to publicly display the copyrighted work, subject to fair use.

The copyright owner holds a set of exclusive rights: the right to make reproductions of the work; the right to distribute copies of it; the right to make derivative works that borrow substantially from an existing copyrighted work; and the right to make public performances or displays of most works. These rights are limited by certain rights of use granted to the public. The best known of such public rights of use is "fair use."[1]

Some materials are not protectable by copyright. Examples include ideas, facts, U.S. government works, works for which the copyright has expired, works in the public domain, and live performances which are not "fixed."

Who Is the Copyright Owner?

In general, the copyright owner is the person or entity that created the new protectable work.

Copyright owners may be individuals or organizations. In general, the copyright owner is the person or entity that created the new protectable work. A corollary to this principle is that your copyright extends only to your original contributions to the work and does not extend to any elements of a work that may have been borrowed from others. For example, if your new multimedia project incorporates materials from other sources or from the public domain, you may have a copyright to your original organization or compilation of the works, but you have no claim to those borrowed portions.

[1] "Fair use" is not within the scope of this booklet, but it is addressed more fully in a separate publication of the CSU-SUNY-CUNY Joint Committee. That work, *Fair Use of Copyrighted Works: A Crucial Element in Educating America*, is available through the Joint Committee or at **http://www.cetus.org**.

An exception to the general rule is the work-for-hire doctrine, which in its fundamental form in the U.S. Copyright Law states that when an employee creates a work within the scope of employment, the employer owns the copyright. The doctrine, however, has been narrowly applied. For example, it applies only to employees, not to independent contractors. Just because you may have paid someone to create a new work does not mean that you own the copyright to that person's work.

...statutes and court rulings do not make clear whether creative or scholarly work by faculty members should be treated as work-for-hire.

Although the work-for-hire doctrine may be widely applied in the commercial environment, statutes and court rulings do not make clear whether creative or scholarly work by faculty members should be treated as work-for-hire. The law also does not make clear whether the work of research assistants, for example, would be work-for-hire.

Contractual agreements can alter or clarify general results established by the law. Thus, if the law does not clearly indicate who the copyright owner would be, or if the law produces an undesirable result, parties are free to enter into their own agreement on the copyright owner's identity.

Copyrights may be jointly owned by the parties who created the work, or a single copyright owner may agree with another party that they will hold the copyright jointly. In particular, one possible approach to ownership of works created at the university is to hold the copyright jointly between the faculty/author and the university itself. Joint ownership between any parties is often problematic and introduces complex management problems, especially related to dealings with third parties for the publication or other exploitation of the work. Thoughtful agreements or policy standards that define the interrelated rights and duties among the parties is almost always preferable to joint copyright ownership.

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Can Copyright Ownership Be Transferred?

The owner of the copyright may **assign** or **license** all or only part of the set of copyright privileges to other individuals or organizations. This set of rights associated with copyright is divisible; that is, the copyright owner may allow another party to hold or exercise only some of the rights rather than all of them. Copyright ownership, while identified with a single entity, does not have to be an all-or-nothing proposition.

Copyright ownership, while identified with a single entity, does not have to be an all-or-nothing proposition.

Assignments of copyright often occur in the context of publishing agreements. For example, when the author of a book signs a publishing agreement, the author often is asked to assign to the publisher the copyright in its entirety, or at least to assign the rights of reproduction and distribution of the book, so that the publisher can print and sell it. An assignment of copyright, or an ***exclusive*** grant of any one or more of the rights associated with copyright, must be in writing and must be signed by the party who is making the assignment to be effective.

The copyright owner may also grant a ***nonexclusive*** right to a particular use of the work. "Nonexclusive" in this context means that owner can grant the same right to other parties. These transactions are called "licenses," and a common example of a license is the permission given to photocopy or otherwise reprint an existing work. Nonexclusive licenses do not have to be in writing, but a written confirmation of the transaction is always good practice.

Ownership of copyright means both the right to protection and the responsibility to exercise that protection.

Licenses do not have to give away everything. The owner of the copyright is free to set limits as to who, what, when, where, why, and how the material may be used. The owner may also set a price for the licensed use.

Ownership of copyright means both the right to protection and the responsibility to exercise that protection. That is, one cannot just own the assets; the liabilities belong to the owner, too.

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Court Cases on Copyright Ownership

Few court decisions have clarified whether certain types of new works produced by faculty will belong to the professor or to the university. These occasional decisions provide important insight on the applicability of the work-for-hire doctrine to faculty work. They also underscore the importance of well-planned agreements and clear university policy to help resolve uncertainty.

Williams v. Weisser, 273 Cal. App. 2d 726 (1969)

A professor owns the common law copyright to his or her lectures.

This case...reveals policy concerns that underlie ownership issues.

A for-profit company paid students to attend university courses for the purpose of taking notes and providing a typed version of the notes. The company created outlines from the notes and sold them to university students.

Ownership: Under the pre-1976 common law applicable here, a professor, not the university, owns his lecture materials regardless of whether the professor developed the materials during his "leisure time" or university time; the copyright is with the professor and not with the employer. The court emphasized the undesirable consequences of constraining a professor's ability to build on his or her work and to move freely to other institutions. Although this case relies on the former law, it reveals the policy concerns that underlie ownership issues.

Express Agreement: A university-issued memorandum proclaimed the professor's property rights in his lectures. The court expressly distinguished a university lecture from other "products of the mind" an employee is hired to create. Lectures were distinguished from "valve designs, commercial drawings or radio scripts," which are owned by the employer.

Weissman v. Freeman, 684 F.Supp. 1248 (S.D.N.Y. 1988)

Collaborative work efforts can result in joint ownership of the work product.

...joint owners...share equally in the ownership and control of the work unless otherwise agreed.

Two nuclear medicine physicians conducted research that was documented in papers, syllabi, and articles throughout the project. Their efforts culminated in a booklet used by the physicians for lectures. One physician objected when the other author prepared a new version of the material for his own lectures but removed the name of the second author.

Ownership: A collaborative work product results in joint copyright ownership, even if the authors did not contribute equally. As joint owners, each contributor shares equally in the ownership and control of the work unless otherwise agreed.

Express Agreement: Lacking an express agreement allocating rights to control the work product, both physicians shared equally in the ownership of the work. As such, each author is permitted to modify or update the material as needed for his or her use.

Weinstein v. University of Illinois, 811 F. 2d 1091 (7th Cir. 1987)

A professor owns his or her scholarly work, while the university owns materials created for administrative purposes.

...the court differentiated scholarly work from administrative work.

Three professors agreed to work jointly on a clinical program for practicing pharmacists culminating in an article describing the results. One professor changed the work and published his own article with his name listed first in the list of co-authors.

Ownership: Tradition dictates that scholarly articles are owned by the scholar or professor and not by the university, even under the "work-for-hire" provision of the Copyright Act. As co-owners of the copyright material, one author may modify the work product

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(create a derivative work) and publish the new version without infringing on the other co-authors' property rights.

Express Agreement: A university policy set forth parameters for when a faculty member retains copyright. Interpreting that university policy, the court differentiated scholarly work from administrative work, which would fall under the work-for-hire provision of the Copyright Act. If, for example, the professor is commissioned to participate in a study for the use of computers at the university, the resulting report is the property of the university.

University of Colorado Foundation v. American Cyanamid, 880 F.Supp. 1387 (D. Colo. 1995)

In a case where the issue is not contested, a court will readily conclude that scholarly journal articles are "work-for hire."

...faculty, individually, may not have the resources to defend or assert their legal claims to ownership of copyright.

Two professors of the University of Colorado agreed to perform a study for Cyanamid, a private company. The study resulted in new findings and a published article in a scientific publication. University patent policy established that inventions made by university employees using university facilities were to be assigned to the university. Although the policy did not extend to copyright, the court readily accepted the university foundation's assertion that journal articles also belonged to the institution.

Ownership: The university owns the copyright to the article written by its professors, because it was work done within the scope of their employment.

Express Agreement: The professors and the university were cooperating on this litigation, so they did not contest this issue. Cyanamid also did not contradict the university foundation's claim of institutional ownership. The case tacitly reveals that faculty, individually, may not have the resources to defend or assert their legal claims to ownership of copyright.

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SECTION 4

Ownership of New Works at the University and the Pursuit of Higher Education

The tradition of ownership of copyright at most American universities is that ownership is presumed to vest initially with the creator of original works, typically a faculty member. Copyright ownership represents an opportunity to promote or to inhibit access to copyrighted works. The owner may make works freely available or may allow access or use under stringent or costly circumstances. Most creative work at universities is scholarly in nature, and most authors intend for their works to be widely shared and studied.

...copyright should...be understood as a divisible bundle of rights that may be allocated among different parties to provide maximum opportunities for sharing and learning.

An academic environment that best advances knowledge will view copyright ownership as a set of opportunities that may be shared within the university community rather than as an "all-or-nothing" property concept. To optimize the availability of new works for teaching and scholarship, copyright should not be viewed as a simplistic claim of title, but should instead be understood as a divisible bundle of rights that may be allocated among different parties to provide maximum opportunities for sharing and learning. Effective publication of articles, for example, does require a grant of rights to the publisher for reproduction and distribution, but publishers seldom need all rights of copyright ownership.

A careful allocation of rights among parties can best allow faculty to build on their previous works, enable colleagues and students to benefit from one another's research and creativity, and allow universities to foster the greatest growth of knowledge from increasingly scarce support funds. In particular, our proposal calls for a sharing of new works within the broadest possible university community.

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We seek to overcome some of the narrow application of fair use in some recent court rulings and "guideline" agreements...

We affirm the right of creative faculty members and others to retain primary control over their new works; we also recognize that sharing of knowledge is central to the success of academic institutions, and copyright should not inhibit productive work. In that regard, we also understand the narrow application of fair use in some recent court rulings and "guideline" agreements; in response, we seek to overcome those developments by making works more widely available by better managing our own copyrights and allowing greater rights of use beyond the confines of fair-use law or publication contracts.

SECTION 5

Unbundling of Rights: A Decision Framework

Philosophical Basis

Universities exist to advance and disseminate knowledge, and they accomplish those objectives through teaching, research, publication, and community service. Faculty members usually provide creative contributions which bring new works into existence, while their home institutions provide essential facilities and support. The most fruitful environment for teaching, learning, scholarship, and creative activity, therefore, involves recognition of the shared interests among creators, colleagues, and their institutions in promoting the growth of knowledge from those new works.

This approach is rooted in the firmly held belief that all parties share the common goals of furthering higher education's mission...

The decisions concerning copyright matters at today's colleges and universities need to address copyright ownership, the assignment of all rights associated with copyright ownership or the licensing of apportionment rights, and the distribution of associated revenues or royalties, if any. The related issues are complex; the decision framework presented here provides a model for avoiding pitfalls and contentiousness. This approach is rooted in the firmly held belief that all parties share the common goals of furthering higher education's mission, and that they have a thorough understanding of the interdependence between the creator or author of new works in a university setting and his or her academic institution. New policies and agreements must not diminish the power of the partnership between American academic authors and their universities.

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Three Key Factors

This booklet suggests three key factors for reevaluating the relationship between the faculty member who reates a new work and the university, which may have a stake in the use of the work for future studies and instructional programs. Our proposal suggests three factors that may help identify the extent of the professor's and the university's rights respecting the work. These factors will hardly define a prescribed result; instead, each factor is a continuum, and the factors must be weighed against one another to determine the overall outcome for determining the copyright owner and allocating the rights.

The three key factors: (1) *creative* initiative; (2) *control* of content; (3) extraordinary *compensation* or support provided by the university.

The three factors are: (1) the **creative** initiative for the new work; (2) the **control** of its content; and (3) any extraordinary **compensation** or support provided by the university. The following pages explain these factors.

We need to underscore that our focus for this effort has been on the creation of scholarly works and instructional materials. We believe that administrative works created by faculty—from committee minutes to curriculum studies—are appropriately the property of the institution for advancement of its objectives. Nevertheless, in the spirit of "unbundling" of rights we espouse here, the university may own the copyright, but the professor(s) who created it should have rights to use the content in other contexts, particularly future projects of a similar nature, or to incorporate the content into scholarly studies or instruction.

Who Initiated the Creative Effort?

A finished work owes its existence to the person who conceived of the idea and to the author(s) who created and fixed the protectable expressions. Those contributors are not always the same person. Our primary focus is on the person who initiates the creative content of the finished work. For example, a dean or personnel committee may encourage faculty members to create publications in general or may even suggest specific projects. While such occurrences are

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initiative of a sort, they alone would not ordinarily move this factor in favor of university ownership. By contrast, under most circumstances the faculty member chooses and defines the content of scholarly projects and course materials.

The creative initiative factor will most often weigh heavily in favor of the author.

Given the independent nature of scholarly inquiry and the academic freedom that must protect classroom instruction, the creative initiative factor will most often weigh heavily in favor of the professor Our suggested default condition for most colleges and universities is to presume that this factor and the next will weigh in favor of copyright ownership by the author, with the burden being placed on the university to state the rights it wishes to exercise in the language of prior agreements, if any, to be proposed before the creative effort begins.

Who Has Control over the Content, Scope, and Final Approval of the Copyrighted Work?

Degree of control is a second factor to weigh in determining ownership rights. This factor focuses on the extent of control that was, or was not, exercised during the creation of the copyrighted work. This continuum includes the degree to which the university provided direct and detailed specifications for the content and form of expression of the copyrightable work, the extent to which the university specified and controlled the time, place, and manner of creation of the copyrightable work, and whether the university exercised ultimate authority over the final acceptance of, or required corrections to, the final copyrighted work

This continuum includes the degree to which the university specifies, controls,...and exercises ultimate control over...the creation of the finished work.

The more the creative effort is directly specified, detailed, supervised, and overseen by the university and the more the university exercises ultimate control of the acceptance of the final copyrighted work, the greater the likelihood of a decision favoring university ownership of copyright. If the author who creates a copyrighted work controls the content and form of expression—the time, place, and manner of creation, and the timeline and final authority over the acceptance of the finished work—a decision for copyright ownership by the author would be likely.

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What Is the Form of Compensation and Other Support Provided for the Creative Effort?

This factor provides a means of weighing the effect of extraordinary investment by the author's sponsoring university on the question of copyright ownership. Under such circumstances, the university may wish to show a monetary return on that investment.

...funding alone will not determine the question of ownership...

To the extent that a copyrighted work has been created under conditions where the author is afforded the normal compensation by the university and the normal types and amounts of support available to those who occupy similar employment situations, then the compensation and support factor favors faculty copyright ownership. However, when the university provides extraordinary compensation or provides extraordinary levels of support for the creative effort (levels beyond the usual compensation or support generally available to others in the same employment situation), then this factor would favor university ownership.

...ownership determination is a first step toward the more important matter of allocating the set of rights protected by copyright ownership.

That funding alone will not determine the question of ownership is consistent with a provision of copyright law that is often surprising to employers and creators of new works. Under the work-for-hire doctrine, the employer generally takes ownership only if the creator is an "employee," a status that depends on much more than compensation.

Consequently, an "independent contractor" may be paid for work, but that person is not an employee and will therefore probably be the copyright owner under the law.

Copyright Ownership as a Gateway, Not a Fence

The answer to the question of who owns a copyrighted work in a university setting is not an end result in and for itself. Rather, an ownership determination is a first step toward the more important matter of allocating the set of rights protected by copyright ownership. As a

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practical matter, the allocation, or unbundling, of these various rights cannot occur without first identifying a copyright owner who, we believe, ought to accept a set of exclusive or nonexclusive license agreements appropriate to the university setting.

License agreements can, and should in our opinion, enable reproduction, use, and control of the copyrighted work so as to maximize the mutual benefit of the author and other members of the university community. Agreements that could benefit from support within the community include those with publishers of traditional academic papers. Rather than assign all rights to the publishers, for example, the university could support the professor in the effort to retain rights to reproduce and distribute the work for educational and research purposes throughout at least the home campus, and the professor should retain rights to build on the work by developing derivative works.

Some Cautions

License agreements should be enabling tools rather than prohibitive mechanisms.

Agreements should be enabling tools rather than prohibitive mechanisms. It is possible to design and enter into bad agreements, prior or otherwise. Sometimes university faculty and administrators are not as aware as they should be of the relative levels of power which exist within the university environment. While the law does not prohibit anyone from entering into a disadvantageous agreement, all parties at the university need to become alert to the danger of signing onto an agreement that would unbalance the creative process so essential to the functioning of higher education. Unbalanced or disadvantageous agreements breed unnecessary resentment and discontent.

A Role for University Policy

Campus copyright policy can provide guidance for determining who is the owner of a copyrighted work and for allocating among the interested parties the set of rights provided by the copyright law. University policy can help campus administrators and authors efficiently address questions related to these matters as they may be appropriate to the particular campus and as the means for meeting the challenges of copyright.

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University Ownership with Certain Rights Licensed to the Creator

When the copyright to a work created at the university is owned by the university, the creator of the work might be interested in a standard agreement with the university which allocates (licenses) to the creator the ability to exercise rights, without obtaining permission from the university owner, such as:

When the copyright... is owned by the university, the creator might be interested in the ability to exercise certain rights...

- the right to make reproductions of the work to use in teaching, scholarship, and research;
- the right to borrow portions of the work for use in compilations or other composite works;
- the right to make derivative works, such as translations, videotaped versions, film scripts, etc.;
- the right to alter the work, add to the work, or to update the content of the work;
- the right to be identified as the author of the work, including the right to decide whether to allow the author's name to be displayed in association with the work;
- the right of portability; that is, the right to take the work to, and use the work with, a new employer;
- the right to use the work in pursuit of one's profession; that is, during expert witness testimony, in consulting, etc.;
- the right to use the copyrighted work for teaching, scholarship, and research by colleagues or students in one's own department, on one's own campus, across the campuses of a large university system, etc.;
- the right to be informed in advance of any uses, reproductions, distributions, and dispositions of the copyrighted work by the university;

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- the right to retain for his or her university the right to duplication of the work for teaching, scholarship, and research and, on a limited basis, the right to make derivative works even if the author assigns copyright ownership to a third party; and

- the right to exclusive control of all decisions related to the publishing of unpublished works.

Situations may arise where a university copyright owner may decline to enter into license agreements, or may limit a license, for reasons which are unrelated to the actual creation of the copyrighted work. Some of these reasons may hinge on the need for privacy, confidentiality, or the protection of a competitive advantage. Because these circumstances are not rooted in copyright law, they are not discussed here. Nevertheless, they may form the occasional basis for a desire by the university to limit an author's dissemination or certain future uses of a copyrighted work. We recommend the disclosure of these limitations during the prior agreement process.

Creator Ownership with Certain Rights Licensed to the University

When the copyright...is owned by the creator(s), the university might be interested in the ability to exercise certain rights...

Where the copyright to a work created at the university is owned by the creator(s), the college or university might be interested in a standard agreement with the creator(s) which allocates (licenses) to the university the ability to exercise rights, without obtaining permission from the copyright owner, such as:

- on a limited, nonexclusive basis, the right of colleagues and students in the author's own department, on his or her own campus, or on campuses within a large university system to make reproductions of the work to use in teaching, scholarship, and research;

- the right to control whether the university's name or logo is displayed in association with the work;

- the right to require an appropriate acknowledgment of university support of the creation of the work;

- the right to borrow portions of the work for use in compilations or other composite works;

- the right to reproduce the work for uses directly related to advancing the mission or maintaining the culture of the university;

- the right to be informed in advance of any uses, reproductions, distributions, and dispositions of the copyrighted work by the author(s); and

- the right to retain for the university the right to duplication of the work for teaching, scholarship, and research and, on a limited basis, the right to make derivative works if the author or authors assign copyright ownership to a third party.

Circumstances surrounding unpublished copyrighted works, such as course syllabi, lecture notes, exams, student essays, and multimedia materials prepared for the face-to-face classroom, for example, raise many extraordinary issues. We suggest that rights associated with such works remain with the author until the author decides to publish the work. Because the reputation and credibility of an author are related directly to the assessment of publicly shared materials, it is most reasonable to vest with the author all decisions related to publishing new works.

The act of publication—even electronically—constitutes a determination of when a work is ready to be judged for its merit in the crucible of public and professional examination and opinion. In our opinion, inappropriate or premature public access to the private materials associated with teaching, scholarship, and research is likely to foster undesirable consequences in the university environment. Of course, even though an instructor may retain the copyright to unpublished materials, they nevertheless are subject to some measure of "fair use" by third parties who might have access to them.

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Illustrative Scenarios

The following scenarios illustrate the application of the principles and policy positions suggested in this booklet. Because we have not sought to be prescriptive about policies and legal ownership, the resolution of specific situations often will depend on many variables. Most of all, these scenarios illustrate the opportunities for flexibility and creativity in the application of legal principles related to copyright ownership.

Course Syllabi and Class Materials on the World Wide Web

In an effort to expand access to its course offerings in its distance learning program, the university is now asking faculty members to put course syllabi and unpublished course materials and laboratory manuals on the WWW.

...the professor generally creates and controls course materials.

Creation: In most situations, the instructor has sole responsibility for the content and structure of the course. In some cases the structure and content of the course are determined by the institution collectively, especially in core and introductory courses. The extent to which an individual faculty member contributes to the course materials will weigh in favor of the faculty member's ownership of copyright.

Control: While the university may have a policy requiring faculty to develop course syllabi that are consistent with course catalog descriptions, and may even provide a list of particulars to be included in each syllabus, generally professors independently create and develop the particular scope and content to be included in the syllabi. The faculty member controls the expressions used in the syllabus and course materials and the detail and quality of the syllabus and course content. As long as the materials remain unpublished,

or at least generally are not circulated beyond the students in a class or to university officials, the professor ordinarily has complete control over creation, modification, and even access to the materials. This level of control helps strengthen the professor's rights. But if the professor chooses to widen access to the materials through their distribution at conferences or by publishing the works on the Internet, then the professor has reduced his or her control and increased the opportunities for others to build upon those creative works.

Faculty may be asked to agree to a university commission to create course materials for shared or common application.

Compensation and Resources: Ordinarily, the instructor receives no additional compensation for preparing course materials. The creation of such materials is generally part of the instructor's normal instructional responsibilities. If, however, the instructor is specifically commissioned by the university to develop materials for shared or common application, then such works would be available to others consistent with institutional needs.

While no one should be compelled to share their works, voluntary sharing creates strong communities for productive learning.

In almost every situation, the unpublished syllabus and course materials created by an individual instructor will remain her property and under her control. The university may have some rights with respect to course materials only under the most extraordinary circumstances, such as when the materials are the product of a coordinated departmental effort or when the professor has made the materials widely available to the public, such as on the Internet or WWW, or has intended that the materials would be used by others for common classes or laboratory sections. Even under these circumstances, the instructor retains rights to receive credit for her work and to keep the work current and accurate.

Notes of Caution: Educators and students are advised to exercise caution when placing their materials on the Internet. Because of the dynamic phase of technology, materials can be easily duplicated or altered without the owner's knowledge or permission, whether lawfully or not. Instructors should, on the other hand, not use

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their rights to unduly preclude the good efforts of their colleagues. While no one should be compelled to share their works, voluntary sharing creates strong communities for productive learning.

Multimedia—Creative Writing

An English professor wants to use the university's multimedia laboratory to create a multimedia program incorporating her own works which include poems, short stories, essays, drawings, and photographs using the university's multimedia laboratory. She is the sole creator of the program and wants to use it in her instruction.

...where the multimedia center routinely is available for all faculty to use,...then the university has not committed any extraordinary resources to the project....

Creation: The professor is the sole creator of the content and multimedia program design.

Control: From conception to the final product, she exercises control over the entire project.

Compensation and Resources: If the professor is on a campus where the multimedia center routinely is available for all faculty to use for instructional multimedia projects, then the university has not committed any extraordinary resources to the project and the professor has not received any extra compensation from the university. To the extent that this is, in fact, the independent effort of the professor, then she is likely to own all or most of the rights associated with this project. But, to the extent that the university may have provided unusual or extraordinary support not accessible to all faculty, then the university may have some rights, including future use of the work, or a share of the proceeds from its commercialization.

To the extent that the finished project includes text, photographs, video, music, and other materials drawn from the copyrighted work of others, then neither the faculty member nor the university may claim ownership to that part of the project. If the project includes such materials, the creators need to consider the limits of fair use and the need for permission to use those materials.[2]

[2]This Joint Committee has addressed fair use in another publication. See footnote 1 of this booklet.

Distance Learning—Calculus on Television

The dean asks a professor to teach a televised introductory calculus course through distance learning. The university's media center will videotape the course as broadcast for possible future use to provide instruction for the large number of undergraduate students who need that class.

Creation: The instructor most likely was responsible for creation of the substantive content of the course, while the media center staff created the visual content—the camera images, the graphics, and the like. The university provided the facilities and staff that made the work possible.

The instructor created the content,... media center staff created the visual content,... the university provided the facilities and assigned the staff.

Control: Again, the professor will likely have control over the substantive content, but decisions related to control of the visual images may not be so clear. To the extent that the professor controls graphics and images and develops them, that person will be deemed to have greater control. But if the media center has control over the appearance of the finished work, then the university and its staff will have greater rights. In reality, faculty and staff often share decisions about the shape of the final work, leaving "control" a diffuse concept.

Compensation and Resources: To the extent that the professor receives additional compensation from the university for the project, the university's claim of rights to the work will increase. The university, however, likely is making an extraordinary investment in the project through the assignment of media resources and staff time. The university is not likely to make that investment at all without some prospect of future return of some kind, principally through future use of the project for reaching additional students. By contrast, if faculty have open access to the multimedia facilities and staff at their institution (subject to scheduling, for example), and if the professor received little or no extra compensation or benefit for this particular project, then the university's claim of rights is reduced.

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Overall, a distance learning project is an important example of the growing need for instructors and staff to cooperate as a team, in which they share perspectives and contributions. In the end, however, consideration of these factors underscores that no one party ought rightly claim all rights to the entire work. The professor should not be restricted from utilizing the substantive content in future work, which could result if the university claimed full ownership. On the other hand, the university and the media staff should not be barred from the future use of their investments in the work, which could also result if the professor owned all rights.

...there is a need for a clear agreement, in writing, among the parties before commencing production.

The inevitable complexities of such a project, and the uncertainties of future needs, raise the need for a clear agreement, in writing, among the parties before commencing production. More important than identifying the formal copyright owner of the work, all parties will benefit by unbundling the rights to use the works according to their own needs. For example the university might retain rights for future use for a few years and to reuse the graphics and media elements in other projects. The professor may retain rights to modify and update the content, and to use the content in future writings, research, and teaching. The parties ought to consider other relevant issues such as course load and compensation in future academic terms.

Research Journal Article

An engineering professor completed a research project as the principal investigator pursuant to an NSF grant, which has no restrictions on copyright, publication, or products derived from the grant. He wrote a scholarly journal article based on the research. A leading scientific journal has accepted the article for publication. The standard publishing agreement offered to the professor includes an assignment of all rights, including copyright, to the publisher.

Creation: The professor made all creative contributions to the finished work.

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When the university provides major support to faculty research and publication as a central part of its mission, the university has a strong interest in how the faculty member chooses to manage the ownership of that copyright.

Control: Although the work would not have existed but for the funding from NSF and probably some oversight by the university, substantive control of the research and of the published article will be predominately that of the professor. Because of the formal grant arrangement that governs such work, to the extent that any party wanted to assert control over this work, that party had its opportunity to do so in the negotiation of the grant contract.

Compensation and Resources: Any additional compensation that the professor might receive may be the result of the grant funding and not from the university itself. If the university has provided extraordinary support in addition to the external grant support, then, perhaps, the university may have some claim to this copyrighted work. At some universities the management of the grant funds by the university will itself be deemed to constitute "extraordinary support."

In sum, even in a situation involving an external grant and university oversight of it, rarely would the university have any claim to own the copyright to this work. On the other hand, faculty research and publication often are central to the mission of the university and to the general support that universities provide to faculty members. The university, therefore, has a strong interest in how the faculty member chooses to manage the ownership of that copyright. A professor typically might assign the copyright to a publisher of such an article, leaving that professor unable even to use his own work in future research and teaching without permission from the publisher. The university may assert a "shop right" that would require the professor to retain rights to use the article for teaching and research by that professor and by all colleagues at that university.

SECTION 7

Recommendations

College and university policy positions on issues related to copyright ownership may reflect principles articulated in this booklet by taking the following actions:

One Adopting written policy statements that establish a framework for addressing the ownership of diverse materials commonly created on campus, including course materials, scholarly articles, multimedia projects, and distance-learning videotapes.

Two Adopting a set of general principles for determining ownership based on the three factors described in this booklet: **creation**, **control**, and **compensation**.

Three Establishing a framework for allocating or "unbundling" rights associated with new works in order to make them most appropriately available for teaching, learning, and research.

Four Providing standard agreement forms for the university to enter into with faculty members and others in order to clarify ownership of copyrights and the allocation of rights associated with specific projects.

Five Specifying in written agreements the persons who will own and manage certain rights associated with a project and the allocation of rights to others, particularly rights of copying for teaching and study by colleagues and students at the author's home university.

Six Encouraging authors to retain rights to future uses of their works when entering into publishing agreements; in particular, authors should avoid giving all rights to publishers and should retain rights of future use for teaching and research by the author and by others at the author's home university and perhaps elsewhere.

Seven Providing for easier and clearer rights to use works held by the university and its faculty for the advancement of learning throughout the domain of American higher education.

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A Listserve Opportunity

To facilitate an open discussion and to help track developments and points of view regarding ownership scenarios, we invite your thoughts. Specifically, we invite you to join the ownership scenarios listserv, located at **[ownership-talk@calstate.edu]**, with related information available at **[http://www.cetus.org.]** To sign on to the listserve, send an e-mail message to **[ownership-talk-request@calstate.edu]** with the single word **["subscribe"]** as the body of the message. In the beginning, for economic reasons, the listserve will not be monitored. Please contribute messages with your thoughts about the evolving meaning and circumstances which are associated with various scenarios such as those presented in Section 6.

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CSU Members

Janis Andersen, *Associate Dean*
Graduate Division and Research
San Diego State University

Kenneth D. Crews, *Joint Committee Consultant*
Associate Professor of Law and of
Library and Information Science
Indiana University-Purdue University at Indianapolis

Mickeal Gehringer, *Attorney*
Office of the General Counsel
CSU Office of the Chancellor

Rolland K. Hauser, *Chair of Working Group*
Professor of Geosciences
CSU Chico

Maynard Robinson, *Chair of Joint Committee*
Vice President for Business and Finance
CSU Stanislaus

Paul S. Spear, *Statewide Academic Senator*
Professor of Psychology
CSU Chico

Bonnie F. Dunn, *Staff to Joint Committee*
Process Manager
IRT, Information Technology Policy and Analysis
CSU Office of the Chancellor

SUNY Member

Christine Haile
Associate Vice Chancellor for Technology Services
SUNY System Office

CUNY Member

Lisa Livingston
Director Instructional Media
City College/City University of New York

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